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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 111 54198 Office: CALIFORNIA SERVICE CENTER Date: NOV 29 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Other Worker pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3).

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

A Form G-28, Entry of Appearance, was filed in this matter. On that form, the petitioner's ostensible representative does not indicate that she is an attorney but states that she is a "bonded immigration consultant." That ostensible representative's name, however, does not appear on CIS's list of accredited representatives. As such, the file contains no evidence that the petitioner's ostensible representative is qualified and authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

The petitioner is a home for the elderly. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that it had not established that the beneficiary has the necessary qualifications for the proffered position as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for

processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on September 5, 2000. The proffered wage as stated on the Form ETA 750 is $1,691.73 per month, which equals $20,300.76 per year. At item 15, Other Special Requirements, the Form ETA 750 states that the position requires that the beneficiary "must obtain First Aid, CPR, [and a] Health Screening Report issued by the State of California Health and Welfare Agency and states that the beneficiary "must know food nutrition, food preparation, food storage, [and] menu planning."

On the petition, the petitioner stated that it was established during March of 1990 and that it employs seven workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since July of 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Thousand Oaks, California.

With the petition, the petitioner submitted no evidence of the its continuing ability to pay the proffered wage beginning on the priority date and no evidence that the beneficiary has been certified in First Aid or CPR nor evidence that the beneficiary had received a Health Screening Report. Further, the petitioner submitted no evidence that the beneficiary possesses the requisite knowledge of food nutrition, food preparation, food storage, and menu planning.

Therefore, on June 6, 2003 the California Service Center issued a Request for Evidence. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested (1) the petitioner's complete 2000, 2001, and 2002 tax returns, (2) the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters, (3) the Form W-2 Wage and Tax Statements showing wages paid to the beneficiary during 2000, 2001, and 2002.

The Service Center also noted that the Form ETA 750 states that obtaining first aid and CPR certification and health screening reports is a requirement of the job. The Service Center further noted that the Form ETA 750 states that the beneficiary must be willing to be fingerprinted and to have the fingerprints submitted to the Department of Justice. Observing that the beneficiary has allegedly been working for the petitioner since July 2000, the Service Center asked that the petitioner demonstrate that the beneficiary has met those requirements.

In response, the petitioner submitted a letter stating, "This is to inform you that Thousand Oaks Home Care is under our corporation Kwan-Dinse Enterprises Inc." The petitioner provided the 1999, 2000, 2001, and 2002 tax returns of Kwan-Dinse Enterprises Incorporated. The petitioner provided copies of its business licenses which confirm the relationship between the petitioner and Kwan-Dinse, but do not precisely stipulate the nature of that relationship.

Because the priority date is September 5, 2000 information pertinent to the petitioner's financial condition during prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The 1999 tax return will not be considered.

The 2000 return shows tha[redacted] declared a loss of $222,751 during that year. The corresponding Schedule L shows that at the end of that year[redacted] current liabilities exceeded its current assets.

The 2001 return shows that[redacted] declared a loss of $13,119 during that year. The corresponding Schedule L shows that at the end of that yea[redacted] current liabilities exceeded its current assets.

The 2002 return shows that[redacted] declared a loss of $53,053 during that year. The corresponding Schedule L shows that at the end of that yea[redacted] current liabilities exceeded its current assets.

The petitioner submitted, as requested, the petitioner's Form DE-6 reports for the third and fourth quarters of 2002 and the first and second quarters of 2003. Those reports show that the petitioner paid the beneficiary $1,800 during each of those quarters except the first quarter of 2003, when it paid her $1,200. The petitioner submitted 2000, 2001, and 2002 W-2 forms showing that it paid the beneficiary $1,200, $7,200, and $7,200 during those years.

The petitioner also submitted evidence that the beneficiary was certified in First Aid on February 21, 2001, had submitted her fingerprints to the Department of Justice on October 23, 2000, and had received a health screening report on July 18, 2000. The petitioner submitted no evidence that the beneficiary has been certified in CPR. The first aid certification and the submission of the beneficiary's fingerprints both occurred after the September 5, 2000 priority date.

The director denied the petition on September 15, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and that the evidence submitted did not demonstrate that the beneficiary has the requisite CPR certification. The director also noted that the evidence indicates that the beneficiary received her first aid certification after the priority date, and that no evidence has been submitted that the beneficiary meets the requirement of knowing food nutrition, food preparation, food storage, or menu planning.

The director noted that the request for evidence made no mention of the prerequisite knowledge of nutrition, food preparation and storage, or menu planning, but stated that the petitioner was obliged, nevertheless, to demonstrate that the beneficiary had that knowledge. The director also observed that the petitioner had worded the requirements on the Form ETA 750 such that the requirements need not be met until after being hired. The director stated, however, that no provision is made in the visa process for requirements to be met after the process is completed and that all of the requirements on the Form ETA 750 must be met prior to the priority date.

On appeal, the petitioner notes that first aid, CPR, and health screening requirements noted on the Form ETA 750 were clearly not prerequisites to hiring, but were to be met after hiring. The petitioner argues, therefore, that the beneficiary meets the minimum requirements of the Form ETA 750 if she is willing to obtain her first aid and CPR certifications and her health screening after being hired.

As to the petitioner's ability to pay the proffered wage, the petitioner submits a letter, dated October 9, 2003, from its accountant. The accountant notes that, of the petitioner's $222,751 loss during 2000, $174,014, or approximately 74% of the loss, was the expense of management. The accountant noted that during the ensuing years, the petitioner ceased paying that fee and characterized that management expense as a one-time cost.

The accountant also emphasized the amount of the petitioner's depreciation deduction and amortization expense. Counsel noted that those expenses account for an additional 14% of the petitioner's loss during 2000. The accountant states that in light of those facts the petitioner clearly has the ability to pay the proffered wage.

The beneficiary's willingness to fulfill requirements after hiring, or at any time after the priority date, will not be considered in adjudicating this visa petition. The director noted, the regulations make no provision for fulfilling requirements after the priority date or after hiring. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). Even if such a provision were a part of the regulations, the petitioner would be obliged to establish not only the beneficiary's willingness, but also her ability to fulfill those requirements after being hired. The beneficiary's first aid certification was received after the priority date and her fingerprints were submitted to the Department of Justice after the priority date. Further, the petitioner submitted no evidence that the beneficiary "know[s] food nutrition, food preparation, food storage, or menu planning."

In his letter, the accountant asserted, but did not demonstrate, that the petitioner's management costs were a one-time expense. The accountant did not state why the petitioner's management costs would be exceptionally high during one particular year. Counsel has not demonstrated that the large expense is unlikely to recur.

The accountant's reliance on the petitioner's depreciation deduction and amortization expense is misplaced. Those deductions do not represent specific cash expenditures during the year claimed. They are systematic allocation of the cost of a long-term assets, tangible and intangible. The depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated.

While those expenses do not require or represent the current use of cash, neither are they available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its redistribution as convenient.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner employed the beneficiary since July 2000 and paid her $1,200, $7,200, and $7,200 during 2000, 2001, and 2002, respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $20,300.76 per year. The priority date is September 5, 2000. The evidence submitted appears to be sufficient to show that the petitioner is identical to Kwan-Dinse Enterprises Incorporated.

During 2000, the petitioner paid the beneficiary $1,200. The petitioner must show the ability to pay $19,100.76 balance of the proffered wage. During that year, the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its income. The

petitioner ended the year with negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to it during that year with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner paid the beneficiary $7,200. The petitioner must show the ability to pay $13,100.76 balance of the proffered wage. During that year, the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its income. The petitioner ended the year with negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to it during that year with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002, the petitioner paid the beneficiary $7,200. The petitioner must show the ability to pay $13,100.76 balance of the proffered wage. During that year, the petitioner declared a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its income. The petitioner ended the year with negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to it during that year with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2000, 2001, or 2002. Therefore, the evidence does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary met the qualifications for the proffered position on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.